IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

JOSE PADILLA	)	
	)	
Petitioner	)	
	)	
-versus-	)	2:04-2221
	)	
COMMANDER C.T. HANFT, U.S.N. Commander	)	
Consolidated Naval Brig	)	1-5-05
	)	
Respondent	)	Spartanburg, SC

HEARING ON PETITIONER'S MOTION FOR SUMMARY JUDGMENT

BEFORE THE HONORABLE HENRY F. FLOYD
UNITED STATES DISTRICT JUDGE, presiding

A P P E A R A N C E S:

For the Petitioner:

JONATHAN MARC FREIMAN, ESQ.
Wiggin and Dana
PO Box 1832
New Haven, CT 06508

MICHAEL P. O'CONNELL, ESQ.
Stirling O'Connell and Pennington
PO Box 882
Charleston, SC 29402

ANDREW G. PATEL, ESQ.
Andrew G. Patel Law Office
111 Broadway, 13th Flor
New York, NY 10006

DONNA R. NEWMAN, ESQ.
121 West 27th Street, Suite 1103
New York, NY 10001

	JENNIFER S. MARTINEZ, ESQ. Stanford Law School 559 Nathan Abbott Way Stanford, CA 94305
For Respondent:	DAVID B. SALMONS, ESQ. DARYL JOSSEPHER, ESQ. Office of the Solicitor General U.S. Department of Justice 950 Pennsylvania Avenue, NW Room 5252 Washington, DC 20530
	MILLER W. SHEALY, JR., AUSA US Attorney's Office PO Box 978 Charleston, SC 29402
Court Reporter:	Jean L. Cole, RMR PO Box 10732 Greenville, SC 29603

The proceedings were taken by mechanical stenography and the transcript produced by computer.

THE COURT: Welcome you to Spartanburg in the matter of Padilla versus Hanft. Mr. O'Connell, as local counsel would you introduce the folks you have with you.

MR. O'CONNELL: Yes, sir. At the end of the table is Jonathan Freiman. He's admitted in Connecticut. Next to him is Jennifer Martinez who's admitted in Virginia. This is Andrew Patel who's admitted in New York. And this is Donna Newman who is also admitted in New York. They've all been admitted by your Honor pro hac vice.

THE COURT: All right. Thank you. Mr. Shealy.

MR. SHEALY: Yes, your Honor. Thank you. Your Honor, with me today is Mr. David Salmons from the Solicitor General's Office and also Mr. Daryl Josepher of the Solicitor General's Office.

THE COURT: Thank you. There are two hours set aside. If you run -- if you get through quicker, that's fine. If you run over, that's fine too. There may be some questioning back and forth. Judge Carr, who's been managing the case for me in Charleston is here today as well, and we've been conferring a little bit. I thought you should know that up front. So who's arguing for --

MR. O'CONNELL: Mr. Freiman, your Honor.

THE COURT: Mr. Freiman.

MR. FREIMAN: Thank you, your Honor. I'd like to begin by thanking you for granting the application for pro hac

admission and to the court's hospitality to those of us from out of state.

May it please the court, never before in this nation's history has the president been granted the authority to imprison indefinitely and without charge an American citizen seized in a civilian setting in the United States. Your Honor, the constitution allows him no such power. History shows that the power to imprison citizens suspected of being enemies of the state is a power that is particularly subject to governmental abuse and to guard against the risk of that abuse the framers established numerous constitutional safeguards, safeguards that were fortified by constitution -- by congressional enactments in the wake of the ratification of the constitution and to the present day.

Yet today the executive asks to set aside those carefully constructed protections. It asks this court to sanction a radical new path, a shadow system of preventive detention without charge for any citizen it suspects of being an enemy of the state. Now, before the court can ratify such an unprecedented infringement of citizens' freedom congress must at a minimum enact a clear and unmistakable authorization, an authorization that specifies who may be detained, for how long and under what conditions.

Your Honor, the Authorization for the Use of Military Force is not such an authorization. It authorizes the

use of necessary and appropriate force, a phrase that the court in Hamdi found to include the well established detention of enemy combatants on a foreign battlefield, but the unprecedented detention without charge of Americans in America seized from civilian settings is neither necessary nor appropriate.

It's not necessary because the criminal justice system provides for the detention power. Nothing makes that clearer than the facts of this case. There was a warrant issued from a grand jury for Mr. Padilla's arrest. Mr. Padilla was arrested by law enforcement officials, civilian law enforcement officials. He was brought before a civilian judge. He was imprisoned in a civilian facility in New York. Everything occurred according to the civilian process in the way it was supposed to. And it's not only not necessary, but not appropriate. It's not appropriate because it directly conflicts with the limits on detention that congress has set by statute and the limits that the framers set on presidential power.

I'd like to begin with some of those congressional enactments, your Honor. The first one I'd like to bring your attention to is the Non-Detention Act, 4001(a) of Title 18 of the United States Code. The Non-Detention Act's text is perfectly clear. Citizens cannot be detained except on an act of congress. It contains no exceptions whatsoever. It's congress's extraordinarily clear statement on this issue.

But if one thought the text not clear enough, one

could turn to the legislative history. And in turning to the legislative history one would find that congress had in mind precisely the detention that we are here today arguing about.

In the wake of internments of Japanese Americans during World War II congress passed something called the Emergency Detention Act. That was at the time of what was thought to be a grave threat from a worldwide communist conspiracy to destroy capitalism and take over the United States. It was in fact at the heart of the cold war. And the Emergency Detention Act at the time expressed congress's understanding that there was a need for the president to have the detention power to detain spies and saboteurs who were working with such foreign agents as the Soviet Union and the Soviet Empire.

In passing that enactment congress also provided for procedural safeguards. There were limits on the periods of detention, ways in which the propriety of a presidential decision had to be determined. In short congress spoke clearly to who could be detained, how long the person could be detained and the manner in which the person could be detained.

In the wake of the Emergency Detention Act congress changed its mind. It determined that the president should not have the authority to detain suspected spies and saboteurs outside of the criminal process. In fact, nothing could be clearer than an interaction between the primary sponsor of the

bill, the author, a Representative Railsback, and a primary opponent of the bill, Representative Ichord who was at the time the chair of the House Internal Security Committee.

The House Internal Security Committee opposed the act and Representative Ichord said that this would -- I'd like to quote here, your Honor, from those debates. And this is contained in some of the analysis that the Second Circuit set forth. Representative Ichord said, "Under the Youngstown Steel case this amendment would prohibit even the picking up at the time of a declared war, at a time of an invasion of the United States, a man who we would have reasonable cause to believe would commit espionage or sabotage."

Representative Railsback in no way disagreed with Representative Ichord's statement. To the contrary he said the president would not have such power independent of the criminal laws, and he drew Representative Ichord's attention to the briefs of the Attorney General Hoover, who had been attorney general during the internment of Japanese Americans that was the subject of Korematsu case. Hoover had believed that the criminal laws provided the president with more than sufficient power to survey and detain those people who in fact were threats to the security of the United States.

In the wake of this debate between the primary sponsor and the primary opponent of that bill congress made a clear determination not to vest the president with this power,

to repeal the Emergency Detention Act, but indeed not only to repeal the Emergency Detention Act, to go one step further, not to leave the president with whatever powers he might have absent any form of statutory enactment, but to speak clearly opposed to such detention powers, not only to say we take from you this statutory grant that in the past we have given you, but now we affirmatively prohibit you from doing such things. And the plain language of 4001(a) bears that out. That is congress's clear statement, your Honor.

Now, it is clear that an authorization to use force, a general authorization to use force does not satisfy the requirement of an act of congress that congress itself instituted through 4001. It does not do so because at the time of the Japanese internments there was, of course, a full-blown declaration of war against Nazi Germany. Even President Roosevelt did not claim the authority to detain the Japanese Americans merely on the existence of that authorization to use force that was implicit in the declaration of war. He sought further congressional action, congressional criminalization of military orders establishing the zones, exclusion zones to which Japanese Americans could not go and the curfews that were meant to fortify those exclusion zones. Even there the president would not have the authority to do this. That's what congress intended.

So two things, your Honor, to recap the repeal of

the Emergency Detention Act and the fact that congress clearly had in mind the Japanese American internments that were at issue in Korematsu, that's congress's clear statement in 4001 and its clear decision to repeal the authority and prohibit this sort of activity that it had given in the Emergency Detention Act.

I'd like to draw your Honor's attention now to another what I think is a key statutory marker for us here today, and that is the Patriot Act. The Patriot Act, as your Honor knows, was passed a mere five weeks after the Authorization to Use Military Force. The Patriot Act expressed congress's understanding that there was a need to provide the president with greater detention powers than he had had up to that date. That need came of course out of 9-11. In the wake of 9-11 congress gave the president the power to detain aliens who represented a threat to the United States because of their connections with terrorist activity; aliens, not citizens, your Honor.

Even that authorization came only on the heels of considerable congressional debate. That debate resulted in limitations on the president's power to detain aliens. There were time limits. There were provisions for judicial review, provisions for appeal, careful procedural mechanisms. In other words, congress had clearly said who was to be detained, for how long they would be detained and under what conditions they would be detained.

Now, the president's argument here is in essence that despite the fact that congress debated for a long time about the particularities of the president's power to detain aliens in the wake of 9-11 it silently authorized the detention of citizens five weeks earlier. Your Honor, not only does that violate the "clear statement" rule that we've set forth in our briefs, it violates plain old common sense. There is no way that anyone could look at the congressional record of that period, that five week period in American history following the horrific attacks of 9-11, and think that congress thought that it had authorized the detention of American citizens when it authorized the use of troops in battles.

Congress knows how to speak clearly. Congress knows how to authorize detentions. It authorized detentions in the Patriot Act. In the Authorization for the Use of Military Force it authorize the troops. I would point your Honor's attention to Section 2(b09 of the Authorization for Use of Force, which explicitly says that congress intended to grant authority to the president to continue the use of troops under the War Powers Resolution.

In other words, in this very authorization congress noted when it meant to satisfy a prior statute and yet it did not note that it meant to satisfy 4001, that it meant to give the president an unprecedented power of detention over American citizens. And, again, the debates five weeks later make

perfectly clear that congress had no such intent in mind.

Your Honor, not only does it violate the statutory enactments and thereby become palpably inappropriate under congress's authorization, it is also in violation of numerous constitutional provisions. We would state at the outset that this court need not reach those constitutional questions because the case can be easily resolved on the basis of the statutory enactments. But in the event this court feels necessary to go beyond an interpretation of the Authorization of Use of Military Force and beyond the traditional application of the "clear statement" rule, I would point your attention to the very separation of powers that the framers instituted in the constitution.

First and foremost, I'd like to note that nothing in our argument refutes the notion that we were at war and that we are at war with a vicious enemy. But the framers knew that this nation would face threats to its very existence. They knew more than anyone that this nation would face threats to its very existence and so they wrote into the constitution emergency powers. They created assurances in the constitution that it would not become a suicide pact.

The primary trigger for emergency power in the constitution is, of course, the Habeas Suspension Clause, a power given to congress. Congress may announce that times have become so grave by virtue of invasion or rebellion that the time

has come to give the president the power to detain individuals suspected of being a part of that danger without criminal charge, without warrant in the positive law, without specifications as to who may be detained, for how long he may be detained or under what conditions he may be detained.

Now, the president here seeks to take that power from congress, to exercise it unilaterally to determine who among our citizens should be ripped from the protections of the criminal laws. But the framers knew that that protection needed to be vested in congress because it knew that the decision as to the propriety of the onset of an emergency power could not be put in the hands of the entity that would wield that emergency power. The framers knew that it made no sense, that it was inconsistent with the notion of a free society to give to the president the power to enhance his own powers. Only people through their representatives could decide to provide such power.

The Habeas Suspension Clause, as I noted, contemplates war on our soil. That's what an invasion is. That's what a rebellion is. And congress has proven itself up to the task in our history of suspending habeas when it feels that it is warranted. Habeas has been suspended four times in our history.

And, your Honor, if the president of the United States feels that we have come to a pass as dire as those four

instances in our nation's history, it is open to him to go to congress and to request such a suspension. It is open to him to begin the process of democratic deliberation that the framers believed central to any beginning of emergency powers. He has not done so. He has not asked congress even to speak clearly and unmistakably.

In fact, in a nutshell the president's entire argument is that he need not be bothered with going to congress. The framers intended precisely the opposite. They intended that a decision about the onset of emergency powers, something that would bring us closer to a state of martial law, was a decision that needed to involve the nation that could not be made within the hallways and the confines of executive power.

Your Honor, there are other provisions of the constitution that augment and fortify the reading I have just given you of the Habeas Suspension Clause. The Treason Clause of the constitution is the only clause of the constitution mentioning a substantive crime. Treason, of course, involves making war against the United States or some outer boundary of war against the United States. And yet in the Treason Clause the framers provided heightened procedural protections. I think we see the theme here in both the Habeas Suspension Clause and in the Treason Clause, the suspension clause being the only common law writ constitutionally preserved and the Treason

Clause being the only substantive crime constitutionally provided for.

In these two provisions, the two provisions of the constitution envisioning war on American soil, the founders upped the ante. They didn't lower the bar. They didn't say in these conditions we give to the president enhanced power. No. In these conditions we give to the executive diminished power because this is where the risk comes in, because when the president acts on his oath to invoke emergency powers and to tear citizens from the fabric of the criminal law, that's precisely where the risk of error and abuse that the framers knew so well came into play.

Of course, the framers' experience was with King George. The framers' experience was with the British monarchy. And the entire history of the writ of habeas corpus in English law was of executive efforts to detain citizens suspected of being or associating with enemies of the state, and that was a history of abuse.

Your Honor, I'd like to turn for a moment to what I think is the government's primary argument, and that is essentially that the combination of the cases of Hamdi and Quirin gives the president the authority to detain Mr. Padilla and anyone who the government suspects of being or associating with an enemy of the state.

As the Fourth Circuit noted before its opinion was

vacated by the Supreme Court, the situation in Hamdi of a capture on a foreign battlefield of an enemy soldier and a detention of an American citizen on American soil in the United States is a comparison between apples and oranges.

Indeed one thing that the Fourth Circuit noted with particularity was the difference in the application of the Non-Detention Act, 4001(a). I draw your Honor's attention to the third Hamdi opinion, 316 F 3rd at 468, where the panel noted that 4001(a) functioned principally to repeal the Emergency Detention Act which had provided for the preventive apprehension and detention of individuals inside the United States deemed likely to engage in espionage or sabotage during internal security emergencies and that there is no indication that 4001(a) was intended to overrule the longstanding rule that an armed and hostile American citizen captured on the battlefield could be detained.

Even the Fourth Circuit which was vacated by the Supreme Court knew there was a difference between foreign battlefield and the seizure of an American citizen in an American city in a civilian setting. That note additionally, unlike a battlefield capture in a traditional war, as far as we can tell the government intends this detention to last forever. As acting Solicitor General Clement noted in his arguments to both the Supreme Court and the Second Circuit Court of Appeals, he cannot perceive of an end to the war against al Qaeda. So

the government's justification for holding Mr. Padilla that he will rejoin the hostilities is a justification that knows no bounds.

Your Honor, just as the Hamdi case is apples and oranges to this case, so too is the Quirin case. In the Quirin case Mr. Quirin was charged with a crime and tried. A detention without charge is not some lesser included power of criminal

charge, as the framers themselves knew. I'd point your Honor's attention to Alexander Hamilton's statement in Federalist 84 where he noted that confinement of the person by secretly hurrying him to jail where his sufferings are unknown or forgotten is a less public, a less striking and therefore a more dangerous engine of arbitrary government than even execution.

In addition, your Honor, the Quirin case precedes the Non-Detention Act in so far as any of the dicta in the Quirin case could be read to authorize the detention without charge of American citizens. That, of course, was not its holding, but insofar as the dicta could be read that way it precedes the congressional determination to divest the president of such power in 4001.

Your Honor, there are only two ways to detain an American citizen who is suspected of associating with the enemy. There is charge and trial in the criminal process or there is a suspension of the writ of habeas corpus. Neither of those has here occurred.

Now, the government wants you to think that it's a small step from the foreign battlefield capture in Hamdi to a shadow system in America of preventive detention and arrest without charge, a small step from that criminal charge and military trial in Quirin to the indefinite military detention without charge here. It's not a small step. It's the difference between apples and oranges.

It's why Judge Parker in the Second Circuit said that extending Hamdi to this situation would be to effect a sea change in the constitutional life of this country and is why the only Supreme Court justices to speak to the merits of this case noted that at essence in this case is nothing less than the essence of a free society. Before this court redefines the essence of a free society it should be absolutely sure that that is what congress wants. Because there's no evidence that congress wants this radical new path this motion should be granted.

Unless your Honor has any questions.

THE COURT: I don't at the moment.

MR. FREIMAN: Thank you, your Honor.

THE COURT: Mr. Salmons.

MR. SALMONS: Thank you, your Honor. May it please the court. The current motion requires the court to presume the truth of the government's factual submissions and determine based on those facts whether the president has the authority as

Commander in Chief during ongoing hostilities to detain petitioner as an enemy combatant.

The court should answer that question in the affirmative because the facts set forth in the government's return and the accompanying declaration place petitioner squarely within the category of persons that the Supreme Court has held in both Quirin and in Hamdi are subject to detention by the military as enemy combatants.

Those facts, again, that must be presumed true for purposes of this motion include that in July two thousand petitioner successfully completed an application for al Qaeda's al-Farouq training camp in Afghanistan where he received weapons and explosives training, that he closely associated with Mohammed Atef, a senior al Qaeda operative and military commander and other al Qaeda leaders and planners in Afghanistan both before and after the 9-11 attacks, that while armed with an AK-47 assault rifle he associated with Al Qaeda and Taliban military forces in Afghanistan during combat operations there by United States and coalition forces, that after eluding capture and destruction by coalition forces he entered Pakistan where he immediately met with Osama bin Laden lieutenant Abu Zubaydah, an al Qaeda leader, and 9-11 planner Kalid Sheik Mohammad, at which time he received additional training and accepted a mission to travel to the United States to carry out additional al Qaeda attacks on American citizens within our own borders.

And lastly that when he was taken into custody attempting to enter the United States in Chicago O'Hare International Airport, he was carrying telephone numbers and e-mail addresses for his al Qaeda contacts, more than ten thousand dollars in cash, travel documentation and a cell phone, all of which had been given to him by the al Qaeda leaders and planners he conspired with in Pakistan. Under these facts it is clear that the president has the authority as Commander in Chief and under the authorization for use of military force enacted by congress in response to the 9-11 attacks to detain petitioner as an enemy combatant.

Now, while the war against al Qaeda and its supporters may raise important legal questions that remain unsettled, it is important to recognize that with regard to the legal question currently before this court there is much that is settled. For example, as the controlling plurality opinion in the Hamdi decision makes clear, we know that when congress in responding to the savage attacks of 9-11 authorized the president to use all necessary and appropriate force against a nation's organizations or persons associated with the 9-11 attacks, that congress's authorization included what the plurality in Hamdi referred to as the fundamental and accepted power of the Commander in Chief to detain as enemy combatants individuals who associated with Al Qaeda or Taliban forces and engaged in armed conflict against the United States and

coalition forces in Afghanistan.

It is equally clear, your Honor, that the power to detain al Qaeda and Taliban forces applies without regard to the citizenship of the detainee. As the Supreme Court unanimously held in Quirin and the four justice plurality and Justice Thomas reaffirmed in Hamdi, citizenship in the United States of an enemy belligerent does not relieve him of the consequence of his belligerency.

There is therefore no doubt that if petitioner had been captured in Afghanistan carrying his AK-47 without al Qaeda and Taliban forces before his escape into Pakistan and subsequent mission on behalf of al Qaeda to the United States, just like Hamdi, who was captured in similar circumstances, there is no question that he would be subject to detention as an enemy combatant. Indeed at that time the only difference between Hamdi and Mr. Padilla is that while Hamdi's association was limited to the Taliban, Mr. Padilla associated with Taliban forces and in addition was also a trained al Qaeda fighter.

THE COURT: How does the president characterize al Qaeda? Is it a military organization or a criminal organization? What is it characterized as?

MR. SALMONS: Well, I think, your Honor, it has been characterized in different ways, but fundamentally it is -- it has been characterized as a global terrorist network and organization at which we are at war. His determination that

designated Mr. Padilla as enemy combatant --

THE COURT: Why can't you fit it into one category or the other, military organization or a criminal organization? Why can't you --

MR. SALMONS: Well, it certainly is -- well, let me just step back for one moment, your Honor, and say that I think that it is certainly true that the president of the United States, the executive, has the authority and has the ability to bring criminal charges against individuals who take actions on behalf of al Qaeda. Just as was the case in Quirin, the executive could have brought criminal charges against the Nazi saboteurs, including an American citizen or presumed American citizen. They were subject to criminal charge.

THE COURT: It wasn't presumed. It was conceded he was an American citizen, wasn't he?

MR. SALMONS: It was -- it was not contested in that case. That's correct, your Honor.

THE COURT: Okay.

MR. SALMONS: But the point being that he was treated as a citizen. Everyone assumed he was a citizen and he would have been subject to criminal charges, but nonetheless the president could bring -- could determine he was best handled by the military because of his combatant status. And the same is true with regard to al Qaeda. I think that -- that it's within the president's discretion both as Commander in Chief and as his

responsibility to take care that laws are faithfully executed to decide how best to address a particular case.

But fundamentally it is clear that not only this executive, but in fact the world has recognized that there is a war with al Qaeda and that it is, in fact, subject to the laws of war and it is a military organization as well. This -- again, the Supreme Court in Hamdi made clear that the reason military force was used against the Taliban forces was because of their affiliation and protection and support of al Qaeda. It would be remarkable if an individual who was a fighter for al Qaeda would somehow be immune from the laws of war whereas forces for the Taliban that were protecting him and escorting him through Afghanistan would not be. Both are subject to the laws of war.

THE COURT: Well -- okay. You're operating under the theory that the power comes under the law -- laws of war. Well then, why don't protections of the conventions like Geneva and Hague have some play in this case?

MR. SALMONS: Well, your Honor, the president has made the determination that because al Qaeda is not a signatory to the Geneva conventions and because in any event they do not comply with the laws of war, for example, they are not entitled to POW status. Al Qaeda detainers are not entitled to a POW status because they don't wear uniforms and fixed emblems required by the laws of war. They target civilians so they do

not qualify for treatment as a prisoner of war.

But, again, I would refer your Honor to the Supreme Court's decision in Quirin. The court in Quirin made clear that by longstanding tradition and acceptance that there was a category of combatants that were deemed to be unlawful combatants because they did not comply with the laws of war. And on page thirty-five of the Supreme Court's decision in Quirin the court said our government has recognized there is a class of unlawful belligerents not entitled to the privilege of POW status, including those who though combatants do not wear fixed and distinctive emblems.

Petitioner's theory would be that those individuals, because they have not sought the benefit of the laws of war, would somehow be immune from the application of the laws of war to them. And in fact Quirin is exactly to the contrary and it would be a -- would be passing strange to reward individuals who violate the laws of war by immunizing them from application of the laws of war, your Honor.

And so I think at this -- as this case now comes before your Honor it is clear that individuals associated with al Qaeda, and in particular let me just use the definition that the Supreme Court in Hamdi, the controlling plurality decision, used with regard to enemy combatants, and it said that an individual who was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who

engaged in an armed conflict against the United States there were subject to detention as enemy combatants.

Mr. Padilla satisfies and fits squarely within that definition. He was part of and supporting forces hostile to the United States or coalition partners in Afghanistan. Again, the declaration attached to our return makes clear that he was carrying an AK-47 with al Qaeda and Taliban forces in Afghanistan while coalition forces and United States forces were engaged in combat operations. So there is no doubt that he fits within that definition of enemy combatant that the Supreme Court has adopted.

The only other time the Supreme Court has had occasion to define a category of United States citizens that are subject to detention as enemy combatant was the Quirin case, and the definition that the Supreme Court used in that case, your Honor, and this is on pages thirty-seven and thirty-eight of the Supreme Court's decision in Quirin is that citizens who associate themselves with the military arm of the enemy government and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents and are subject to the laws of war. And again, Mr. Padilla fits that definition of enemy combatants.

So I think if you take it one step at a time it's clear that if he were -- if he were captured on the -- on the battlefield in Afghanistan carrying his AK-47 with Taliban and

al Qaeda forces, he would be subject to detention during -- for the duration of the hostilities just as Hamdi was, your Honor.

Then the only question is is there anything about the fact that he managed to elude capture or destruction in Afghanistan by our forces, make it into Pakistan where he met with al Qaeda leaders and undertook a mission to come to the United States to continue his hostile and warlike acts against our citizens here that relieves him of the status of an enemy combatant? And both the Supreme Court's decision in Quirin and common sense make clear that there is not.

And I would refer again, your Honor, to the rationale of the Supreme Court of the plurality decision in Hamdi where it noted that a United States citizen is just -- poses just as much threat of returning to the battlefield and continued hostilities as a noncitizen. And so we know that an individual who just like Mr. Padilla came to the United States at the direction and with the aid of our enemy forces to carry out hostile and warlike acts here, this enemy combatant under Quirin is subject to military detention.

And there is no rational way to conclude that the congress that enacted the Authorization for Use of Military Force in the wake of the savage attacks of 9-11 would have wanted to authorize military force for an individual if he happened to have been caught overseas, but if that individual had eluded our capture and managed to make it to our borders

here in the United States bent on coming to carry out hostile and warlike acts, that the president lacked that authorization to use military force there.

THE COURT: Suppose in Quirin where they obviously were charged and convicted --

MR. SALMONS: They were charged before a military commission, your Honor, that's correct.

THE COURT: Suppose we frame the question differently. Does the president have the power to detain enemy combatants? Change the question based upon the facts and circumstances as they exist today with regard to Mr. Padilla. Does he still have that continuing power to detain him as an American citizen based on the facts and circumstances today?

MR. SALMONS: If I'm sure I understand your question, your Honor, it is knowing what we know today about Mr. Padilla, would the president today, if he got the same information that Mr. Padilla was attempting to enter the country, have the authority to detain him as enemy combatant?

THE COURT: And the passage of time.

MR. SALMONS: Yes, your Honor, he would. We are still at war with al Qaeda. Our forces are still in Afghanistan. There are tens of thousands of United States forces there still engaged in combat operations. Nothing has changed with regard to whether or not the president still has the authority to detain an individual as an enemy combatant. As

long as the hostilities are ongoing the president has that authority.

Now, precisely when the hostilities may end is a question that we do not know the answer to right now, but I would refer your Honor to what the Supreme Court -- excuse me, the plurality, again, of the controlling plurality opinion in Hamdi said about that, and that is that while there may be some questions with regard to applying the "during the course of hostilities" aspect of the president's authority to detain enemy combatants in this context, at least while there are forces still on the ground in Afghanistan that authority exists and that the habeas courts remain open.

And if at some point in time a challenge is brought on the theory, I guess, that perhaps the hostilities are now over or are sufficiently over or that some constitutional concern would override that authority because the amount of time that has elapsed, a court would be free to hear such a challenge. To date no challenge like that has been raised, and I think it's conceded -- we just heard it's conceded that we are still at war with al Qaeda.

And it seems to me that as long as that is true the president has the authority as the Commander in Chief. And if anything, your Honor, I would say that the unconventional nature of our current enemy should give the Commander in Chief more discretion and more deference with regard to how he determines

to exercise his inherent power as Commander in Chief as well as the broad authority granted him by the authorization for use of military force by congress.

We are in a situation, your Honor, that the Supreme Court noted in Youngstown and in times of war where you have a broad authorization by congress to use all necessary and appropriate military force and you also have the president as Commander in Chief exercising his inherent authority as Commander in Chief, and in that context courts have to be particularly careful and deferential to the Commander in Chief's determinations about who is an enemy combatant.

These are not determinations that are that different in -- they are not different in kind from the type of determinations about who to target or about what sites to target during warfare. These are decisions that certainly in the first instance the constitution leaves to the Commander in Chief subject to habeas review by this court.

But the question that this court is concerned with now is not what procedures may be due in a habeas proceeding, but simply whether there is any authority, either inherent authority for president as Commander in Chief or authority under the authorization for the use of force resolution that congress enacted in the wake of 9-11 to detain a United States citizen taken into custody at the borders of the United States attempting to enter at Chicago O'Hare International Airport.

Under any circumstances if it was, you know, no matter how close his affiliation with al Qaeda, no matter how many acts he had taken to carry out attacks in the United States the question is is there any authority on the part of the president to detain such an individual militarily? And we think the answer is yes.

THE COURT: Assuming that Mr. Freiman would make this argument, I'd like you to address that Quirin was decided pre Non-Detention Act and clearly Mr. Quirin said that he was a member of the German Army even though he was an American citizen. That fact was not challenged. Tell me how -- tell me from your point of view why the Non-Detention Act does not trump Quirin.

MR. SALMONS: Certainly, your Honor, and I would make a couple of points. First is that the Non-Detention Act -- again, I'm starting from the premise that I think that we're all starting from, which is a plurality -- the plurality opinion from the Supreme Court in Hamdi is the controlling opinion for purposes of this case and that in that case the plurality determined that the -- that Section 4001(a) doesn't preclude the detention of a United States citizen if they were captured -- if they had -- if they were part of or associated with Taliban forces in Afghanistan and engaged in armed conflict against the United States there.

Now, what petitioners want to do is to say, yeah, but he was captured overseas whereas Mr. Padilla was captured,

you know, while he was trying to enter the country at Chicago O'Hare International Airport. I would point your Honor to the various places in the Hamdi plurality decision where they defined the category of enemy combatants that are -- that's subject to detention as they're applying that term, and it makes no reference to where the individual was captured. It speaks in terms of an individual being part of or supporting forces hostile to the United States and engaged in armed conflict in Afghanistan. And as I've said, Mr. Padilla clearly satisfies that.

But even if you were to think that perhaps some difference should turn up where the individual was captured, nothing in 4001(a) turns on the locus of the capture. 4001(a) speaks in terms of the detention of a United States citizen. All of the arguments that petitioners are making now were made and were rejected by the plurality in Hamdi with regard to the application of 4001(a) and this context.

And what the plurality said in Hamdi, your Honor, and this is at page 26 -- 2641 of the Supreme Court's decision. That's 124 Supreme Court 2641 the court said that it was of no moment that the AUMF, the Authorization for Use of Military Force, does not use the specific language of detention or for that matter the specific language of citizen because the detention to prevent a combatant's return to a battlefield is a fundamental incident of waging war and permitting the use of

necessary and appropriate force congress has clearly and unmistakably authorized the detention in that case with regard to an individual that was part of or supporting enemy forces in Afghanistan and engaged in an armed conflict.

So they're left now without their best argument with regard to 4001(a), which is that you have to have some clear statement about detention, and now instead they're forced to make an argument that somehow the point of capture matters. But, again, the text of 4001(a) just speaks with regard to the detention of a United States citizen and makes no distinction with regard to where he's captured.

And for the reasons that we've been discussing, your Honor, there is no supporting either law or logic as to why the locus of the capture should matter. The individual is either an enemy combatant or he is not. And if he is, he is subject to detention under the fundamental and accepted -- again, those are the words of the plurality in Hamdi -- authority of the Commander in Chief during wartime. And of course congress included that within its authorization for use of force.

The other point I would make, your Honor, is with regard to the authorization for use of force. You have to -- you would have to read some limitation into the phrase "necessary and appropriate use of force", and they would -- I believe their argument is that necessary and appropriate would preclude the detention here because it's not necessary. There

are other charges that could be brought against him and it's not appropriate because he's a U.S. citizen and it's inconsistent with our constitutional tradition.

Again, both those arguments, I think, were rejected in Quirin, and I think they were also rejected -- at least with regard to an individual that was part of or associated with Taliban forces and engaged in armed conflict in Afghanistan in the Hamdi case.

But if you look at the Authorization for Use of Force, it begins by pointing out that because of the nature of the attacks on September 11 and because the forces that were responsible for those attacks continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States, that congress had determined -- and this is in the preamble -- that those acts rendered it both necessary and appropriate -- the same language -- that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad.

And, your Honor, I would respectfully submit that to understand whether the congress had enacted the authorization for use of military force was concerned about enemy combatants coming within our own borders, you have to put yourself back into the mind set that the nation had one week following the 9-11 attacks. It's easy, I think, and tempting and somewhat dangerous now to look back after three years and to remind

ourselves that we have not had another attack within our borders during that time period and that instead our forces have been engaged exclusively or almost exclusively in combat on foreign battlefields.

But if one week following the 9-11 attacks I think it simply fictional to say that the congress that enacted that wasn't concerned about enemy forces, al Qaeda forces coming into the United States and carrying out hostile acts -- hostile acts here and that by authorizing the president to use all appropriate and necessary force to defend us both at home and abroad that there is no way that you can distinguish or think that congress meant to impose some limit on his ability to use military force against an enemy combatant when we are at the most vulnerable.

In other words, to put it sort of colloquially, an authorization to use force against an intruder on the outskirts of your property cannot rationally be construed to prohibit you from using force against the intruder when he's attempting to enter your living room. And that's essentially what you would have to think congress intended in authorizing use of military force here in order to impose some restriction that says you can use force if you capture him overseas, but if he escapes your forces there and then undertakes a mission to infiltrate our borders and to carry out hostile and warlike acts here, your hands are tied.

I just don't think that's what congress intended. I don't think there's any rational way to read congress's authorization for that. And there's nothing in 4001(a) that would support that distinction because, again, it does not speak to the locus of the capture. It speaks to the detention of United States citizens.

And the last thing I would say, your Honor, and I thought it was interesting that petitioner's counsel made reference to the Fourth Circuit's decision in Hamdi III with regard to the application of Section 4001(a). It has been the position of the United States all along throughout these cases that Section 4001(a) was never intended to apply to the detention of enemy combatants during wartime.

And that's how I read the Fourth Circuit's decision in Hamdi III. What the Fourth Circuit there says is that the detention was authorized by both the Authorization for Use of Military Force and by the provision that provides for funding of detention of combatants.

But in any event the court said there would be -- it would be very strange to read any restriction of 4001(a) onto the president's power as Commander in Chief to detain combatants because it was intended at most to deal with the situation where you're detaining, as in the context of the Emergency Detention Act, not combatants. The individuals that were detained under the Emergency Detention Act were not combatants, your Honor.

It was the type of concern that was motivated by the Supreme Court's decision in Korematsu, the detention of individuals not because they were engaged in hostile and warlike acts as part of the enemy have forces, but just because you suspected them of having some connection with the enemy or potentially, you know, committing acts of sabotage or espionage. And that it was that type of detention that 4001(a) was intended to preclude absent an authorization of congress, not the detention of enemy combatants during wartime, which is a fundamental and accepted aspect of the president's Commander in Chief power.

And the Fourth Circuit, I would submit, in Hamdi III held both that it was satisfied and also that it didn't apply because it doesn't apply to detention of enemy combatants. And, of course, the Supreme Court vacated that on other grounds, but if you were to look to what was the Fourth Circuit's guidance on that, I would, again, encourage your Honor to look at that. That's at 316 F 3rd 468 and see what the Fourth Circuit said with regard to the application of 4001(a). I think the best reading of that statute is it doesn't apply at all.

Now, the Supreme Court didn't resolve that issue in Hamdi because it found that the authorization for use of military force in fact authorized the detention because -- because it found that the -- it was so fundamental and accepted an incident of war to be an exercise necessary and appropriate

to the use of force that the detention of enemy combatants, even U.S. citizens in that context.

So the question, again, your Honor, I think is that we should start with what we know what is settled law after the Supreme Court's decision in Hamdi. We know that if the United States forces in Afghanistan had managed to capture Mr. Padilla there, that he would be subject to detention as an enemy combatant. I don't think there's any dispute about that.

The only question left is that is there anything about the fact that he escaped capture or destruction in Afghanistan and then accepted a mission on behalf of al Qaeda to come to the United States to commit hostile and warlike acts here that make him less of an enemy combatant? And there's just no basis in law or logic to conclude that that -- that that would reduce the president's authority.

A few other points, your Honor, and that is one of the petitioner's principal arguments in response to that is to suggest that if you piece together a portion of the dissenting opinion in Padilla with the opinions in Hamdi, you can -- they can count the five votes they think for the proposition that you cannot apply -- you cannot detain a United States citizen if they are captured here in the United States.

And there are several problems with that, your Honor. The first is that both the Supreme Court and the Fourth Circuit have repeatedly admonished lower courts not to engage in

that type of speculation about what the Supreme Court might do when it hears an issue. And that's particularly true when you're piecing together parts of concurring and dissenting opinions in different cases.

And that's a fundamentally different exercise than trying to determine what the Supreme Court actually held in a case such as Hamdi where you have a fairly fractured court and you have to determine what the actual holding of the court was. I think however you try to undertake that analysis with regard to what the holding of Hamdi was, you end up with the conclusion that the holding was necessarily that the president had the authority to detain Mr. Hamdi and that more procedures were due on remand. And that's the plurality decision authored by Justice O'Connor.

Again, that admonition not to speculate about what the Supreme Court might do is all the more appropriate here because the dissent that they rely on is just a one sentence footnote in the Padilla decision and it's a prediction about what Justice Breyer would do. Even though he joined the dissent it was Justice Stevens' dissent.

And but most fundamentally the main reason why it would be inappropriate to do that in this context -- and this, I think, bears emphasis, your Honor -- is that the record that would -- that the Supreme Court would have before it if this case ever makes it back there would be fundamentally different

this time around than it was before, because at the time that the record was established in the Southern District of New York it was still fairly soon after Mr. Padilla had been taken into custody as an enemy combatant and we know a lot more about his activities on behalf of al Qaeda now than we did then, including all of activities with al Qaeda and Taliban forces in Afghanistan during combat operations there. And it just remains to be seen what difference those facts will have on the Supreme Court if they ever are called upon to decide this issue at some future date.

THE COURT: Well, as I understand it, the two sides agreed to have this question answered, and I'm assuming you're going straight up the ladder once the question is answered here. How is the record going to be any different?

MR. SALMONS: Well, your Honor, again, the way this issue has been -- is teed up now for the court is that they have filed what they've styled a motion for summary judgment that essentially says even if you assume all the truth -- excuse me, if you assume the truth of all of the government's factual submissions, the president still lacks the authority to detain Mr. Padilla as an enemy combatant. So that is a legal question, but it assumes all of the facts that we have put into evidence through our return and the accompanying declaration.

Now, they want to make some quibbles about those facts and whether they were admissible or whether they're

sufficient, but they've it seems to me for purposes of this motion sort of put aside those objections and they're required to assume the facts -- those facts are true and make a legal argument the president still doesn't have the authority.

So if that issue were to go back to the Supreme Court now, it would be in the context of a case that contain factual allegations not just that he was acting on behalf of al Qaeda when he attempted to enter the United States and was bent on hostile acts, but also that he was an enemy combatant in the true Hamdi sense, your Honor, that he was -- again, this is the definition the Supreme Court applied in Hamdi -- an individual who was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and was engaged in armed combat against the United States there. He fits that definition under the facts that we have alleged. He also fits the definition from Quirin, and so it may very well be the case.

I guess there would be a question with regard to whether to certify that legal issue for an interlocutory appeal as to the timing as to when it might get up to the Supreme Court, but certainly there is that possibility that this issue will get there. But for purposes of this court deciding this motion now the type of speculation about what the Supreme Court would do isn't the proper analysis. It's what the Supreme Court has done, and for that you have to look at the unanimous

decision of the Supreme Court in Quirin and the controlling plurality decision by Justice O'Connor of the Supreme Court in Hamdi. And for purposes of deciding the scope of the president's authority to detain a United States citizen as an enemy combatant that's -- those are the best sources that we have.

And, again, the Supreme Court in Hamdi referred to the Supreme Court's decision in Quirin as the most apposite precedent that we have on the question of the president's authority to detain a citizen as an enemy combatant. And so their attempts to suggest that Quirin is -- doesn't apply because the Non-Detention Act -- excuse me, 4001(a) hadn't been enacted yet or because they were enrolled members of the German Army and the like, we have provided responses to that in our opposition to the motion for summary judgment.

I don't think that's actually an accurate characterization of the facts of Quirin. The individuals there in fact were not enrolled members of the German Army in the ordinary sense. They had been recruited because they had -- they had an affiliation with the United States because one was a citizen. They had lived here and they were assigned this mission to come in as saboteurs, but they were not typical or regular members of the German Army.

But all of that is beside the point. Again, whatever definition that would be applied you would be bound by

Quirin, you would be bound by the plurality decision in Hamdi. And under both those definitions Mr. Padilla's actions place him squarely within the category of individuals that are subject to detention as enemy combatants.

Again, he trained with al Qaeda. He filled out an application for them to enroll in al Qaeda terrorist training camp. He was affiliated with Taliban and al Qaeda forces, carried an AK-47 on the battlefield in Afghanistan. And the only difference is he escaped and then signed up on a mission to come here and to carry out hostile and warlike acts against us within our own borders. That's an enemy combatant, your Honor.

The only other point I would make, your Honor, if you don't have any other questions is that their "clear statement" rule that they rely heavily on is entirely misplaced in this context. All of the cases that they rely on for the proposition that there is some heightened "clear statement" rule required are cases that do not involve the detention of enemy combatants.

They may be cases that arose in the context of national security concerns or war, but they were all -- this includes Ex parte Endo, Duncan versus Kahanamoku, Brown versus United States. These were all cases that while they arose during a time of hostilities, involved the application of military law to regular civilians or to individuals who were not in any way alleged to have engaged in hostile and warlike acts

or otherwise to be combatants, so they are inapposite.

The best case we have, again, for what type of "clear statement" rule, if any, would be applied when the president exercises his authority as Commander in Chief pursuant to a broad declaration of -- or authorization, excuse me, from congress with regard to the use of force is Quirin itself. And what Quirin again said is the fact it applied a "clear statement" rule in the opposite direction. It said that the detention ordered by the president in the declared exercise of his powers as Commander in Chief of the Army in a time of war and of grave public danger is not to be set aside by the courts without the clear conviction that they are in conflict with the constitution or laws of congress constitutionally enacted.

So if you're looking for a "clear statement" rule, that's the one the Supreme Court applied in this context. And if you look at the Authorization for Use of Military Force, there is no way to read it that would preclude the use of force against an enemy combatant if he manages to make it to our borders, and it would be irrational to do so. It would, again, tie the Commander in Chief's hands at the precise moment when we are in the most danger from that combatant. And in the wake of 9-11 I think there is no way to think congress would have intended that result. And, again, nothing in 4001(a) would support that type of distinction.

THE COURT: Thank you.

MR. SALMONS: Thank you, your Honor.

THE COURT: Mr. Freiman, let me ask you a couple of things before you go where you intend to.

MR. FREIMAN: Yes, your Honor.

THE COURT: At the oral arguments in Padilla before the Second Circuit there's a statement in the opinion in the dissent that says that Mr. Padilla's attorneys conceded that the president could detain a terrorist without congressional authorization if an attack were imminent. One, was that -- are you familiar -- do you know whether or not that was said?

MR. FREIMAN: Yes, your Honor. I was there.

THE COURT: Let me take it to the next step before you get me off track here. I don't know why you -- why the petitioner made a decision not to go forward with the due process hearing and the conscious decision made by y'all and the government agreed to handle it this way. But aren't you locking me in based on the fact that I have to take those facts in those -- in their affidavit as true for purposes of the motion? Not that you're conceding them, but as true. Which then leads me to the third part of the question, is if there -- if I'm bound by that and does the -- does where Padilla was arrested make any difference in light of Hamdi?

MR. FREIMAN: Yes, your Honor. Be happy to answer those questions.

THE COURT: And, well, I guess it wouldn't do me any

good to find out why you didn't want to have the due process hearing to start with, because it sure would make my job a lot easier.

MR. FREIMAN: I'm happy to be entirely frank with your Honor about that. The reason that we did not want to move forward immediately with the due process hearing is there are a number of constitutional questions of great magnitude that we think would arise in that proceeding. We don't think that it would allow us to move forward in any sort of an expeditious manner at all.

Just to set out -- sketch out some of the questions that might arise, we know that the plurality opinion in Hamdi joined by Justice Souter's concurrence sets out the requirement of there being some sort of hearing that complies with due process, neutral decision maker, opportunity to be heard presumably in an Article III court. But the opinion itself, as I'm sure your Honor knows, is full of caveats and conditional tenses, all which I imagine we would be arguing over.

As a threshold matter we would be arguing over whether this case is a case sufficiently like the Hamdi case to allow the reduction of due process rights that the Hamdi plurality presumes, that is that's a battlefield capture. Nobody has any doubt that there are all kinds of evidentiary difficulties that arise in the context of a battlefield capture.

But this is not a battlefield capture. This is a seizure in an American city and the evidentiary issues might be very different. The difficulties might not be here. So we would be arguing over, one imagines, whether in fact the government had the burden of proof as it ordinarily does in a 2241 habeas action. We would be arguing over the admissibility of materials that would not ordinarily be admissible under the federal rules of evidence, whether in fact there was some sort of exception carved out. Perhaps the government would argue under the Commander in Chief power to supersede the rules of evidence, et cetera.

There would be all sorts of constitutional questions that would come in there, and there would be constitutional questions that would precede that. What sort of discovery are we entitled to? As we indicated in our motion, the government hasn't yet come forward with any sort of admissible evidence. Well, ordinarily speaking, Rule 56(e) requires the government to come forward with admissible evidence in a 2241 hearing and if the government doesn't, that motion has to be granted.

We understand this isn't an ordinary case. We understand that the government probably has to be given an opportunity to come forward with whatever evidence it does have other than this hearsay affidavit taken under conditions that have no indicia of reliability. All of those sorts of questions would come up, your Honor.

So rather than moving ourselves into a track where we would be litigating weighty constitutional questions for potentially quite a while we thought it made a lot more sense to try to resolve the threshold issue, the question of presidential power at the outset, the thought being that if your Honor and whatever appellate authority was relevant might in fact rule on our behalf, those questions would be mooted. They would not need to be addressed at this time and the courts and the parties and the petitioner would be saved all that work.

THE COURT: Well, if you give the president's material a fair reading, one could say that he thought that a terrorist attack was imminent by Mr. Padilla coming back into the United States. So could he detain him?

MR. FREIMAN: Yes, your Honor, that goes back to your other question. Our view, as I believe expressed by counsel before the Second Circuit, is in fact that the president does have power to detain. That power is in fact primarily under the criminal law. It's what happened here. There was a warrant, a civilian warrant for Mr. Padilla's arrest. He was arrested by civilian law enforcement officials. He was brought before a civilian judge and he was in fact detained in a civilian facility.

The president has that power. One can turn to the criminal process decisions of the Supreme Court. County of Riverside makes clear that the government need not bring an

individual before a magistrate for a forty-eight hour period after detention. There's leeway that the government has under the criminal laws. It has a material witness warrant statute which it used here. The government has a lot of tools is of course the reason why Mr. Hoover thought that those tools were sufficient. This is the reason why there's the brief of former law enforcement officials that says the government has an entire tool box to protect this nation.

Now, if in fact the president thinks that those tools are not enough, even though they clearly worked here, if the president thinks those tools are not enough, he can of course go to congress. He can ask for additional authority and it's up to congress to determine how much authority to give him.

Now, congress has been quite responsive in the past to requests for this sort of enhanced authority. They've also subjected those requests to the deliberative process that the framers intended. Look at the Patriot Act, for example. In the Patriot Act as to the detention of aliens the president had initially asked for indefinite detention. Congress decided that detention of aliens in the wake of 9-11 was warranted, but not indefinite detention, so they set time limits and they set procedures.

And that's the sort of process that should have happened here and that hasn't happened here. I have no doubt,

your Honor, that were the president to go to congress and request enhanced authority, he would receive some sort of enhanced authority, as he nearly always has in the past.

Your Honor, I think that -- let me make sure first since those took a little bit longer to answer than I might have expected that I answered all three of your Honor's initial questions.

THE COURT: Sure.

MR. FREIMAN: Okay.

THE COURT: What do you do about Article VIII -- I mean Article II, Section 8, Clause 11 about congress having the power to make rules concerning captures on land and on water? Is there any other -- can the president act on his own except in an imminent situation?

MR. FREIMAN: Well, your Honor, there's very little case law on the make -- on the make rules regarding captures clause that I know about, but what that is that's one of several clauses that give to congress tremendous authority not just for rule making, but for rule making in the martial context, in the context of war. In fact, the president's powers in the war context are limited to the Commander in Chief powers, and the framers intended that to be a very limited notion.

It's what -- boy, I hope I don't get this wrong -- either Justice Scalia or Justice Rehnquist referred to as the George Washington powers at oral argument before the Supreme

Court. These were -- these were the powers in fact to direct the military, but not to make rules, not to make rules either within the military -- of course, the uniform code of military justice is promulgated by congress, not by the president -- but also to make rules for citizens in wartime. This is a quintessential legislative issue. It's not an executive issue.

And this is the situation that we had in Youngstown, your Honor, where Justice Jackson pointed out very clear that it's not the president's prerogative to be a law maker, he is the executor of the laws. So that clause, I think, fits into the overall structure that I've been discussing here today.

Your Honor, I want to address one thing which I think has a kind of an intuitive appeal. In fact it is to my adversary's credit that he can take apples and oranges and make them into fruit salad. He asked why it would be that it would have been okay under the Hamdi decision for Mr. Padilla to have been seized and detained as an enemy combatant when he was allegedly on a field of battle in Afghanistan, but why it was not okay for him to be seized and detained in Chicago when he came to the United States. And he said there was no reason in law or logic for such a rule.

I'd say, your Honor, there's a reason both in logic and in law and they are reasons that the framers themselves contemplated and sought to give meaning. The reason in logic is that when an individual is seized on a foreign battlefield

capturing a rifle, the odds of that individual not being who the government thinks he is are pretty low, and consequently the risk of governmental error and abuse that the framers sought to guard against is consequently low.

Now, when an individual citizen is seized in a civilian city in the United States on information allegedly received from an informant whom the government itself acknowledges has lied to them in the past, well then, the odds of the government being wrong are quite a bit higher and the risk of error and abuse that the framers sought to guard against is much higher. That's why there's a difference.

And that is reflected, that logical distinction is reflected in the law, in the doctrine. The habeas suspension clause speaks of invasions and rebellions. These are things that happen on American soil. An invasion doesn't happen in Afghanistan in a constitutional sense. It happens here. This is why the framers and congresses in the past have been particularly concerned with what happens here to American citizens.

This is why Youngstown, which we've both spoken of today, noted that president's powers at home were much less than they are abroad, let alone on a foreign field of battle. Here it's congress's powers that are predominant. That's the reason in law and it underscores the reason in logic. This whole thing is about the framers' desire to lower the risk of governmental

error and abuse, and that's why there's distinction between those two situations.

Your Honor, I have some smaller points that I'd like to make in response to the conversation that preceded. The first is, and I think this is obvious from everything that we've all talked about today, but even if Mr. Padilla were determined to fit some definition of enemy combatant, our position is that he is constitutionally and statutorily not subject to detention. Invasions and rebellions have enemy combatants. The text of 4001 is unequivocal. So it's not just a question of whether he fits into some definition of enemy combatant. It's a question of whether the president has the power to detain an American citizen seized from an American civilian setting.

Second, contrary to my opponent's statements the limits in Hamdi are multifarious. We cite easily ten of them in our briefs where the plurality opinion constantly reiterates the narrow circumstances of the decision. I need not belabor those here today.

It is worth noting one additional thing. The Hamdi plurality opinion is controlling in a sense in that it certainly announces the judgment of the court, but as the government acknowledges, it was a fractured opinion and in fact in a particularly odd circumstance the judgment arrived at only because two concurring justices joined in the judgment despite their misgivings about the court's conclusion on the very issue

that we are talking about here today in the context of foreign battlefield.

The opinion is limited in essence to the judgment and what the government is asking you to do is count votes. I think they get the vote count wrong. I think five justices of the Supreme Court have been pretty clear, but were your Honor to wish to disregard those views it would not behoove this court to do the vote counting that the government recommends by adding Justice Thomas' opinion to the opinions in the plurality.

Justice Thomas, of course, was a dissenting justice and he did not concur in the opinion, as such his opinion's not legal force under the Marks decision that we cite in our briefs. In any event, your Honor, the Hamdi opinion noted that 4001 was satisfied, was a battlefield capture, was clear and unmistakable, was clearly unmistakably authorized in the Authorization to Use Military Force.

Your Honor, before I leave off I'd like to make three final points. The Quirin case is about where somebody got tried. Was it going to be in military court? Was it going to be in civilian court? It didn't involve the question of detention without charge. As such most of the issues we are discussing here today, the applicability of the Habeas Suspension Clause, simply weren't raised in that case, weren't briefed. They weren't argued and surely weren't decided.

The constitution contemplates a military justice

system. The Fifth Amendment to the constitution expressly relaxes two constitutional requirements in the context of that military justice system. This is a constitutionally contemplated means for the trying and ultimate detention of citizens.

That's not what the government is seeking here today. The government is not seeking to put Mr. Padilla before a military court to charge him with crimes which they believe he has committed and give him an opportunity to defend himself there. The Quirin opinion is thus not relevant to this situation, just doesn't raise the same issues.

Finally, your Honor, as to the -- I should say penultimately, second to last, the passage of time, as your Honor and everyone at counsel table on both sides is well aware, it has been nearly three years since Mr. Padilla was seized by the military. And the Supreme Court has made clear in that even a battlefield does not last forever.

I point your attention now to the Duncan case, Duncan versus Kahanamoku. In the Duncan case there was, in fact, a suspension of habeas corpus. There was the organic acts for why we had given the executive branch the power to declare martial law in that territory and when Pearl Harbor was attacked in World War II martial law was declared.

But in the Duncan case the court found that two years after the attack on Pearl Harbor martial law could no

longer be allowed to supplant civilian courts in that instance with military courts. Military power on a battlefield did not extend so far even though while still under threat of invasion -- this case was decided in the midst of World War II, still under threat of invasion -- battlefields don't last forever. The military power doesn't last forever, even at its apex.

We are now three years out. That makes a world of difference. And it's not just that we don't know when this war is going to end, as the attorney for the government here said. It's that in fact the government has conceded it doesn't believe this war will ever end. The president said that himself. We cite that in the brief. In addition to the president's statement acting Solicitor General Paul Clement said that before the U.S. Supreme Court.

We're not talking about another year, another three years, another five years. We are talking about we're pretty sure probably never. So if there's going to be a transfer of power of this magnitude to the president, it's going to be an unlimited transfer of power, a transfer of power that has no end, potentially permanent change to the constitutional system.

Your Honor, my final point now for real is the government remarked on the broad authorization for use of military force that it believes was passed in the wake of the 9-11 attacks. For reasons set forth before we don't believe they're nearly as broad as the government does, but even if it

was required, it's not breadth, but specificity. There needs to be clear unmistakable authorization for detention of citizens.

And in fact even if Quirin found there was a clear and unmistakable authorization for a military trial of Haupt and his Nazi comrades by virtue of the fact the articles of war duly enacted by congress had provided for such military jurisdiction, Quirin found that clear and unmistakable statement. And a clear and unmistakable statement would be what's required here. And indeed that's been the understanding of the Authorization to Use Military Force since the beginning of the republic.

The first real battle this nation faced was the battle with France prior to the declared war of eighteen twelve, around the turn of the century, seventeen ninety-eight to eighteen oh two or so. And in that instance congress had authorized the president to seize ships going to France. Well, the president took upon himself to seize ships coming from France and the Supreme Court said no, authorization to use military force cannot be read broadly. It must be read specifically. You do not have the additional power to seize ships coming from France. That was Chief Justice Marshal. Chief Justice Marshal in the war of eighteen twelve reiterated this necessary limited reading of authorization to use military force.

And it's worth taking just a moment to paint a picture of the war of eighteen twelve because we all see

ourselves in extraordinary times now and the war of eighteen twelve was a time when, of course, British forces invaded the United States. There was a full-blown declaration of war. British forces captured parts of Washington, burned the capital and White House to the ground. Just as today's terrorist do, they chose symbolic targets in the heart of America to destroy and they succeeded.

Moreover, at the time President Madison believed New England was on the verge of succession and Great Britain tried to foster that impression by in fact having an embargo around all American ports except those in New England. In other words, the young nation felt itself to be at a moment of extraordinary peril. It felt its very survival to be threatened.

In addition to the declaration of war congress passed an authorization to seize the bodies of enemy aliens in the United States in the Alien Enemy Act, and President Madison sought to read into that authorization the greater authority to seize the property of aliens, their timber. Justice Marshal again said no, the declaration of war was not sufficient. An additional provision of authority to seize the bodies of aliens was not enough. It did not provide the additional authority to seize their timber. That was the framers' own understanding of the constitution. That authorization for use of military force ought to be read narrowly.

All the more so here we are talking about not

timber, not ships, but people. We are talking about the bodies of citizens, your Honor. We are talking about the most irreducible quantum of human freedom. This tradition of our nation from the time of its founding has been to require the clear statements for such detention not expressed here.

THE COURT: Let me ask you three unrelated questions. One with regard to the Patriot Act, was not congress speaking of detaining any aliens, not just enemy combatant aliens?

MR. FREIMAN: Your Honor, it is accurate to say the category of enemy combatants as the government defines here today, it's been defined variously by the government, but as defined here today a category of persons subject to detention under the Patriot Act is not precisely the same. I think it's very much the same insofar as aliens go that if you go through the particular provisions of the U.S. Code referenced in the relevant section of the Patriot Act you see there's a wide variety of terrorist activities that threaten national security that would be covered, but there are certainly some minor differences.

The import of my drawing the court's attention to the Patriot Act is not to say exactly the same authority was provided in the Patriot Act as would have been provided in the authorization for use of military force. It's just that in the Patriot Act we have a very good example of what happens when

congress thinks about who ought to be detained, how long they ought to be detained and what the conditions in regard to detention ought to be. So we have an example of what congress does.

This is a crucial piece of data when it's thinking about this kind of question. In the Authorization for Use of Military Force there's no such discussion. The government's argument is well, even though we know that congress is able to define with meticulous care who, for how long and what conditions, we shouldn't concern ourselves with the fact that they didn't do it here and they didn't talk about it here. It should be silently implied into an Authorization to Use Military Force in contravention of the entire history that I have set forth today.

THE COURT: Another question. Obviously the government's filings and some of the writings on the issue balances citizens' rights to security, national security. Does the criminal law, including treason and habeas suspension, provide adequate opportunity to interrogate a citizen enemy combatant to assure the security of the country and foreign policy?

MR. FREIMAN: Your Honor, I'll say one thing that I have no doubt the government will agree with, that's that I'm in no position to tell you. I don't have an expertise to know that, and it's not my job to know that. I'm the body, and it's

the government that has obligation to make that sort of decision in congress. It's up to congress to determine what's an appropriate extent of authority for the president.

THE COURT: Lastly. Lastly, in the materials there have been distinctions drawn between lawful and unlawful enemy combatants. In the material with regard to unlawful enemy combatant it's always followed with the phrase something like this, they are prosecuted criminally whereas lawful enemy combatants are treated differently. Do you agree with that proposition?

MR. FREIMAN: Yes, your Honor. As the doctrine of the law of war, a person who is a lawful combatant is a person who is entitled to the privilege. That person has the right to shoot members of the enemy. That's a special category, I believe, for war. To ordinarily murder, of course, is to pick up a gun, shoot a person, but if you have belligerent, you have belligerence privilege, you have lawful combatant.

Now, you can lose the belligerence privilege in various ways. And if you lose the belligerence privilege wherein you can be prosecuted for murder, then the fact you picked up a gun and shot somebody on the other side is no longer a privileged act. You could be prosecuted. That's the distinction that's being talked about in the decisions.

There is not in the law of war I should say any kind of authorization to detain individuals of any sort if the law of

war is the body of law that sets conditions on individuals who have been detained. It's what the Hague Conventions do. It's what the Geneva Conventions do. The question of whether there is authority to detain an individual is a question that was ultimately lost -- left to the laws of each individual nation.

THE COURT: Well, does -- the government argued while ago that Taliban and al Qaeda are not signatories to the convention, so therefore persons associated with that group could not be entitled to those protections. That's the position they take.

MR. FREIMAN: I believe the government -- I could be mistaken. I believe that the government acknowledges that the Taliban government by virtue of being the government of Afghanistan was a signatory, but not al Qaeda.

THE COURT: Al Qaeda's not.

MR. FREIMAN: So I'm sorry. Your Honor's question?

THE COURT: Make sure I heard what I heard. Thank you.

MR. FREIMAN: Thank you, your Honor.

THE COURT: Mr. Salmons, briefly in reply.

MR. SALMONS: Just a few things if that's all right, your Honor. First, your Honor, I just want to address the Patriot Act just very briefly and say we agree with the point that your Honor -- with the point of your Honor's question. I don't know if that was necessarily, your Honor, the point of

your question was that the Patriot Act is different from the detention of enemy combatant. It has nothing to do with the fact of war and with enemy combatant. It has to do with detaining aliens under certain circumstances would apply, whether or not we were at war and whether or not someone was affiliated or part of the enemy forces.

With regard to the Treason Clause and Suspension of the Habeas Writ Clause of the constitution, and I think this is very important, that argument as well as the argument about the Patriot Act and others has been rejected by the Supreme Court in Hamdi. And it was also rejected by the Supreme Court in Quirin.

If petitioners are correct that the United States citizen that enters this country bent on hostile and warlike acts and comes in at the direction and with the aid of enemy forces can only be prosecuted for treason or the writ has to be suspended, then Quirin would have to be overturned. That was unanimous decision of the Supreme Court.

And with regard to the detention of such an individual you can't draw distinction from Quirin based on the fact those individuals there were charged with war crimes and were prosecuted and were executed. There's a fundamental difference between detaining someone during the duration of hostilities to prevent them from reentering the battle and engaging in warlike acts against us. That is a preventative

detention. It is not punitive detention.

And detaining someone because they have committed a war crime, that requires a prosecution. There are certain rights that attach. Individuals may be subject to prosecution for war crimes and then for punishment, be it a term of years or be it execution for violation of the laws of war. That is different in kind from the nature of the detention of enemy combatants during ongoing hostilities.

And the Supreme Court, again, in the controlling plurality of the Supreme Court in Hamdi noted this argument that the petitioners made in Hamdi with regard to Quirin in trying to distinguish Quirin because those individuals were charged and the Supreme Court said while the American citizen in Quirin -- Haupt was tried for violation of the law of war -- nothing in Quirin suggests citizenship would have precluded mere detention for the duration of the relevant hostility does not provide a basis for distinguishing Quirin.

And the Supreme Court again in the controlling

opinion from plurality rejects that just with regard to what holding Supreme Court in Hamdi, so there is no way you can conclude that the Supreme Court in Hamdi did not hold that the president had the authority to detain Hamdi as an enemy combatant notwithstanding the fact that Authorization for Use of Military Force did not specifically reference detention for

citizens.

What the judgment of the Supreme Court was in that case was vacating the decision of the court of appeals, upheld the detention and ordered the denial of the petition. It vacated that and remanded for further proceedings to provide whatever process the Supreme Court had determined was due for him to challenge the substance of that.

There is no way the Supreme Court could have rendered that judgment without first concluding that the president had the authority to detain him. Otherwise you would have had an inappropriate advisory opinion. And you do have the four justices in the plurality written by Justice O'Connor that reached that conclusion. You do have Justice Thomas reaches that conclusion in the dissenting opinion, which essentially in part is a concurring in part, dissenting in part opinion.

But you also for that issue have the two justices, Justice Souter and Ginsberg, who although they would have dissented from that portion of the holding, nonetheless in order to render a judgment and to achieve the answer on the second question -- again, two distinct questions in Hamdi -- does the president have the authority and what process is due and in order to render a judgment to the second they were wiling to cast their votes with the plurality on the first, so that is a holding that is binding on this court.

I just want to point out that your Honor had asked

for a stipulation of facts with regard to whether the parties

thought Mr. Padilla was in sort of -- where he was in the process of entering the country. And I just want to make clear to the court what the government's position is on that, your Honor, and that is although we don't think much really turns on that legal matter, if you wanted to describe accurately the facts precisely where he was in the process, he was still at the border of the United States because he was within a secured customs facility of Chicago O'Hare International Airport.

And I would refer your Honor to a case that's not cited in our papers, recently decided case from the Ninth Circuit called Sidhu versus Ashcroft, 368 F 3rd 1169. And that was a case involving an alien who had come through Immigration, had passport stamped, admitted, but had not yet cleared Customs, was in a similar position and the court has determined she had not yet entered because she was still subject to restraint.

THE COURT: Case law even in Hamdi uses the terminology "on American soil". I don't know what difference that makes.

MR. SALMONS: Well, I want to be very clear, your Honor, we actually don't think anything turns on it, but it is true that in each of the cases where we have had the Supreme Court decide whether citizens can be held as an enemy combatant, it has been very circumspect, very careful to narrow the holding to facts before it and only define the enemy combatant, the definition only as far as they needed to in order to render the

decision in that case.

And so you have the court in Quirin talking about enemies associated with the enemy and coming here bent on hostile acts, doesn't go beyond that, although provides lots of examples of people being held as enemy combatant, including citizens.

THE COURT: One other fact, somehow when I read everything both sides submitted, after -- what happened to Padilla after he was interrogated and arrested as a material witness? Was he admitted to bail, allowed to go to New York on his own?

MR. SALMONS: No, your Honor. He was arrested, held on a material witness warrant in a federal detention center in New York and he was there -- was there at the time the president -- on June ninth president determined he was an enemy combatant.

THE COURT: How did he get from Chicago to New York?

MR. SALMONS: My understanding he was placed in a secured Customs area of the airport in Chicago and was taken to New York where he was held.

And the last point I would make, your Honor, is that while there is an awful lot of talk about the executive and the risk that he may round up individuals and hold them indefinitely without charge and the like, it bears to keep in mind that the executive here has only determined two United States citizens

were enemy combatants and were subject to detention.

As such both of those individuals were engaged in armed combat against the United States or coalition forces on the battlefield in Afghanistan. One of them, Mr. Padilla, then escaped and tried to come here, was stopped at the boarder on his way to carry out further hostile and warlike acts against us. This case does not present the sort of slippery slope that petitioners are concerned about. Thank you, your Honor.

THE COURT: Thank you. Thank y'all. As far as timing of the decision I'm going -- I won't commit myself, but we will do our best to be in the thirty to forty-five day range. No promises.

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I certify that the foregoing is a correct transcript from the record of proceedings in the above entitled matter.

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